Office of the State Appellate Defender

Illinois Criminal Law Digest

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In general, the Appellate Court has jurisdiction to review final judgements. However, it lacks jurisdiction to review an interlocutory order unless jurisdiction is afforded by Supreme Court rule. Two rules authorize appeals in juvenile cases. Rule 660(a) provides for appeals from final judgements, and Rule 662 allows an appeal from an interlocutory order where no dispositional order has been entered in 90 days.

The court concluded that where a continuance under supervision is ordered under 705 ILCS 405/5–615 without a finding of guilt or a judgement order, neither Rule 660(a) nor Rule 662 authorizes an appeal. Because the Appellate Court lacked jurisdiction, the appeal was dismissed.

§§2-1, 2-6(a)

People v. Bozarth, 2015 IL App (5th) 130147 (No. 5-13-0147, 1/26/15)

The Illinois Constitution authorizes appeals in final judgements and permits the Supreme Court to provide for appeals of orders that are not final. Supreme Court Rule 604(b) provides that a defendant may appeal from an order of supervision and may seek review of the conditions of supervision, the finding of guilt, or both. Thus, the Appellate Court had jurisdiction to hear an appeal where after a stipulated bench trial defendant was sentenced to one year of court supervision.

(Defendant was represented by Assistant Defender Maggie Heim, Mt. Vernon.)

§2-6(a)

In re C.C., 2015 IL App (1st) 142306 (No. 1-14-2306, 1/6/15)

Under the extended juvenile jurisdiction statute (705 ILCS 405/5–810), upon a finding of guilty the trial court must impose a juvenile court sentence and a conditional adult criminal sentence. If the minor successfully completes the juvenile sentence, the adult sentence is vacated.

If the minor commits a new offense, the adult sentence must be implemented. In addition, if the juvenile violates the conditions of the juvenile sentence in some way other than by committing a new offense, the trial court has discretion to revoke the juvenile sentence and implement the adult sentence.

Defendant was committed to Department of Juvenile Justice until he was 21, with a conditional adult sentence of 45 years in the Department of Corrections. He appealed, arguing that the 45-year-sentence violated the Eighth Amendment and the proportionate penalties provision of the Illinois Constitution.

The court concluded that because the State had not filed a petition to revoke the stay on the adult sentence or accused the minor of violating the conditions of his juvenile sentence, the minor had not suffered any injury due to the adult sentence. Therefore, he lacked standing to challenge that sentence.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

§2-7(b)
People v. Coleman, 2015 IL App (4th) 131045 (No. 4-13-1045, 1/6/15)

In reviewing the denial of post-conviction relief after a third-stage hearing, the court noted that claims of ineffective assistance are considered under a hybrid standard of review in which the Appellate Court defers to the trial court's factual findings but makes an independent determination of the ultimate legal issue.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

COUNSEL

§§13-4(b)(1)(c), 13-4(b)(11)
People v. Coleman, 2015 IL App (4th) 131045 (No. 4-13-1045, 1/6/15)

Defendant was convicted of unlawfully delivering more than 900 grams of a substance containing cocaine. The cocaine was seized in 15 individual bags. After field testing one of the bags, an officer commingled the contents of all the bags into a single container for transmittal to the crime lab. Defense counsel stipulated that if the forensic scientist was called as a witness he would testify that the exhibit was "926.0 grams of cocaine."

1. The court concluded that counsel provided unreasonable representation where he stipulated that the aggregate weight of the substance was cocaine without investigating whether the contents of the 15 bags were tested separately before being combined. Counsel has a duty to make a reasonable investigation or a reasonable decision that makes a particular investigation unnecessary. Where the defendant is charged with possessing a specific amount of an illegal drug and there is a lesser included offense

involving possession of a smaller amount, the weight of the substance is an essential element of the offense and must be proven beyond a reasonable doubt. Thus, where the suspected contraband was seized in separate containers, the State can carry its burden concerning the aggregate weight only if it can show that each of the packages contained the controlled substance.

The court concluded that where defendant was charged with unlawfully delivering the aggregate weight of 900 grams or more of a substance containing cocaine, counsel had a duty to make a reasonable investigation of the chemical testing to determine whether the 15 bags had been tested separately. Where the record showed no reason to believe that the bags had been separately tested, and a police report tendered to defense counsel before trial implied that the contents of the bags had been commingled before any testing by the crime lab, counsel's decision to enter a stipulation without conducting an investigation was objectively unreasonable.

2. In order to prevail on an ineffective assistance claim, the defendant must also show a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. A reasonable probability of a different result is a probability sufficient to undermine confidence in the outcome.

Defendant showed a reasonable probability of a different outcome where, had counsel not entered the stipulation, the State would have been able to obtain a conviction for possession of the contents of just one bag. Defendant then would have been subject to a sentence of six to 30 years instead of the 30 to 60-year term which he faced for delivery of the aggregate weight.

3. The court rejected the State's argument that in the absence of a stipulation it would have presented the testimony of the chemist who tested the substance. The court noted that the chemist could have testified only that the commingled substance contained an unknown amount of cocaine, and not whether the cocaine came from one or several of the smaller bags.

The court also rejected the State's argument that it could be inferred that each of the 15 bags contained substance that had been broken off a one-kilogram block of cocaine for which wrapping material had been found at the scene of the arrest. The court concluded that the entire block could have been a lookalike substance which became mixed with preexisting cocaine residue from some other source. "In short, to prove, beyond a reasonable doubt, that each of the 15 bags contained cocaine, there was no way around [the] requirement of chemically testing the contents of each bag - unless a stipulation freed the State from that requirement. That is what the stipulation did, and it was prejudicial."

Defendant's conviction and sentence for unlawfully delivering 900 grams or more of a substance containing cocaine was vacated, and the cause was remanded with directions to sentence defendant for the lesser included offense of possession of 15 grams or more but less than 100 grams of a substance containing cocaine.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

§13-4(b)(4)

People v. Simpson, 2015 IL 116512 (No. 116512, 1/23/15)

Defense counsel was ineffective where he failed to object to a prior inconsistent statement that was inadmissible under 725 ILCS 5/115–10.1.

1. First, counsel did not provide objectively reasonable representation. There was no strategic reason for failing to object to the statement, and by not raising an objection counsel allowed the State to place defendant's purported confession before the jury. Not only are confessions recognized as powerful evidence of guilt, but in this case the confession highlighted defendants's brutality and his role as the leader of the group of men who beat the decedent.

The court also noted that defense counsel failed to object when the court instructed the jury that it had received evidence of a statement made by the defendant or when the prosecutor argued the prior statement as substantive evidence of defendant's guilt.

2. Second, defendant was prejudiced by counsel's inaction because there was a reasonable probability that had counsel objected, the confession would have been excluded and the result of the proceeding would have been different. The court acknowledged that there was evidence on which a rational trier of fact could have convicted even had the prior statement been excluded. On the other hand, the purported confession was a potent piece of evidence which indicated that defendant played a primary role in the offense.

In addition, an eyewitness was unable to identify defendant or the co-defendant at trial and had expressed uncertainty about his pretrial identifications. Finally, the trier of fact would have been entitled to discount the testimony of accomplices given the relatively light treatment they had received for the same offense. Under these circumstances, there was a reasonable likelihood that the result of the proceeding would have been different had the prior inconsistent statement not been admitted.

The conviction was reversed and the cause remanded for a new trial.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

EVIDENCE

§19-15(b)

People v. Simpson, 2015 IL 116512 (No. 116512, 1/23/15)

Generally, out-of-court hearsay is inadmissible as substantive evidence. Under 725 ILCS 5/115–10.1, however, a prior inconsistent statement may be admitted substantively if it "narrates, describes, or explains an event or condition of which the witness had personal knowledge," and the declarant is subject to cross-examination concerning the statement.

The court concluded that the "personal knowledge" provision requires that the witness had personal knowledge of the events described in the prior inconsistent statement. The court rejected the State's argument that §115–10.1 is satisfied where the witness merely heard a statement about an event that he did not witness.

Here, the witness told police that defendant admitted striking the decedent several times with a baseball bat. At trial, however, the witness said that he had no recollection of making such a statement. The court concluded that the State could introduce a videotape of the witness making the prior statement only if it could show that the witness had personal knowledge of the actual incident and not just that defendant had made the statement. Because the State lacked such evidence, the prior statement was inadmissible.

(Defendant was represented by Assistant Defender Megan Ledbetter, Chicago.)

§19-23(a)

People v. Mister, 2015 IL App (4th) 130180 (No. 4-13-0180, 1/23/15)

1. Under Illinois Rule of Evidence 701, a lay witness may give opinion testimony which is: (1) rationally based on the perceptions of the witness, and (2) helpful to a clear understanding of the testimony or to determination of a fact or issue. Although a witness may not offer opinion testimony regarding an ultimate question of fact to be decided by the jury, opinion testimony is not objectionable merely because it embraces an ultimate issue.

After noting a conflict in authority between jurisdictions and within the Appellate Court, the court concluded that a lay witness may give an opinion concerning the identity of a person depicted in a surveillance video where there is a basis to believe that the witness is more likely than the jury to correctly identify the individual in the videotape. The court rejected holdings that the witness must have prior familiarity with the subject in order to testify concerning his or her identity, finding that the witness's degree of familiarity with the subject goes to weight rather than admissibility. The court also

rejected the argument that such testimony is admissible only if the subject's appearance has changed between the time the videotape was made and the trial.

2. The court concluded that a casino security guard's testimony concerning the actions of two persons on a surveillance video was admissible although the guard was not present when the video was made and did not observe the events that were depicted. The court concluded that the guard's testimony was rationally based on opinions he had developed by repeatedly viewing the video.

In addition, the testimony aided the trier of fact by providing a clear understanding whether the two persons were at the casino and left in the same vehicle. The court noted that the video contained nearly four hours of footage, lacked clarity, was difficult to assess, and involved "fluid scenes and numerous individuals and vehicles." Thus, in the absence of the guard's opinion testimony, the jury would likely miss details concerning the events captured by the camera.

The court found that the testimony did not invade the province of the jury where the guard merely linked the individuals in the video to still photographs which had been taken the same night. Whether the defendant in the courtroom was the person who was depicted in the video was left to the jury's determination.

Finally, the court noted that the weight to be given to the opinion testimony was for the trier of fact to assess. Defense counsel extensively cross-examined the guard and had an opportunity to highlight any deficiencies in the testimony regarding the witness's familiarity with the defendant or the clarity of the videotape. Under these circumstances, the province of the jury was not compromised.

Defendants' conviction for armed robbery was affirmed.

(Defendant was represented by Assistant Defender Kelly Weston, Springfield.)

§§19-24(a), 19-24(b)(1), 19-24(b)(2), 19-24(b)(3)

People v. Johnson, 2014 IL App (2d) 121004 (No. 2-12-1004, mod. op. 1/23/15)

At a jury trial for first degree murder and aggravated criminal sexual assault, the trial court admitted evidence that defendant allegedly committed three other sexual assaults against three different persons. One of the separate offenses occurred 11 years before the charged offenses, and the other two occurred within a few months after the charged offenses. The trial court admitted the other crimes on the issues of propensity, intent, motive, lack of mistake, and *modus operandi*.

The Appellate Court agreed with defendant that the other crimes evidence was inadmissable for the asserted purposes, but found that it was properly admitted as propensity evidence.

1. Generally, evidence of other crimes is inadmissible to show propensity to commit a crime, but is admissible if relevant for any other purpose such as *modus operandi*, intent, motive, identity, or absence of mistake. Subsequent bad acts may be used as other crimes evidence.

725 ILCS 5/115-7.3(b) creates an exception to the general rule in certain sex offense prosecutions. Under §115-7.3(b), in a prosecution for one of the specified offenses the State may introduce evidence that defendant committed another of the specified offenses. Such evidence is admissible for any relevant purpose, including defendant's propensity to commit sex crimes.

Before evidence may be admitted under §115-7.3(b), the trial court must weigh the probative value of the evidence against the undue prejudice it might cause. The admissibility of the evidence rests within the discretion of the trial court, whose decision will not be disturbed absent an abuse of discretion.

2. Here, the trial court erred by admitting the other crimes for motive, lack of mistake, and *modus operandi*. Because defendant maintained that the sexual intercourse was consensual, neither *modus operandi* nor lack of mistake was at issue. Furthermore, there was nothing in the record to suggest that the other crimes created a motive to commit the instant offense, especially where two of the other crimes occurred after the charged crime and the other occurred several years earlier.

3. The court concluded, however, that the other crimes evidence was relevant to show defendant's intent and propensity to commit sex offenses, and was therefore properly admitted. The court rejected the State's argument that under **People v. Perez**, 2012 IL App (2d) 100865, evidence that is admitted pursuant to §115-7.3(b) is admitted without limitation concerning its use. The court concluded that because §115-7.3 authorizes the use of other crimes evidence only if relevant and where the probative value is not outweighed by the prejudicial effect, evidence is admissible only on matters that are relevant under the facts of the case.

The court also rejected defendant's argument that reversible error occurred when the jury was instructed that it could consider the other crimes evidence not only for propensity and intent but also for motive, lack of mistake, and *modus operandi*. First, the trial court was not required to give any limiting instruction. Second, precedent holds that where a limiting instruction permits a jury to consider other crimes evidence for a number of reasons, and one of those reasons is determined on appeal to be improper, the conviction must be affirmed despite the overly broad instruction.

Defendant's convictions for first degree murder and aggravated criminal sexual assault were affirmed.

(Defendant was represented by Supervisor Charles Hoffman, Chicago.)

§§19-24(b)(1), 19-24(b)(3)

People v. McGee, 2015 IL App (1st) 122000 (No. 1-12-2000, 1/23/15)

Defendant was convicted of stalking a CTA employee based on two incidents where he approached her, banged on the windows of her kiosk, and verbally threatened her. The State, over defendant's objection, was also allowed to introduce evidence of a physical altercation between defendant and the CTA employee's husband which occurred two hours after the second incident, when defendant returned to the train station. During that altercation, defendant stabbed the husband with a box cutter. The police later recovered a box cutter from defendant's backpack.

The court held that the admission of altercation between defendant and the husband was improper other crimes evidence and reversible error. The court rejected the State's argument that evidence was admissible as a continuing narrative of the charged offense and to show defendant's intent to harm the CTA employee.

1. Other-crimes evidence is admissible if it is part of a continuing narrative of the events giving rise to the charged offense or is intertwined with the offense. When facts about the uncharged criminal conduct are part of a continuing narrative of the charged criminal conduct, they do not constitute separate, distinct, and unconnected crimes.

Here, defendant's altercation with the husband was a distinct event that was not part of a continuing narrative. It occurred two hours after his last contact with the CTA employee and did not involve any contact with her. Instead, when defendant returned to the station, the husband approached him and the two began fighting. The incident was thus inadmissible as a continuing narrative.

2. The incident was also inadmissible to establish defendant's intent to harm the CTA employee since it showed that he arrived at the station with the box cutter. Even though evidence of the box cutter may have been admissible, the State could have done this by simply showing that the box cutter was found in defendant's backpack at the station. It had no need to introduce evidence of the altercation to prove the existence of the box cutter.

The court reversed defendant's conviction and remanded for a new trial.

(Defendant was represented by Assistant Defender Grace Palacio, Chicago.)

§19-28(b)

People v. Watkins, 2015 IL App (3rd) 120882 (No. 3-12-0882, 1/21/15)

A proper foundation is laid for admitting documentary evidence, including text messages, when the document is identified and authenticated. To authenticate a document, the proponent must demonstrate that the document is what it is claimed to be. Documentary evidence may be authenticated by either direct or circumstantial evidence. Circumstantial evidence includes appearance, contents, substance, and distinctive characteristics. Documentary evidence may be authenticated by its contents if it contains information that would only be known by the author or a small group of people including the author.

Here, the State introduced text messages to show that defendant used the cell phone found in a drawer and thus, by implication, also possessed drugs found in the drawer. But the only evidence offered by the State to authenticate the text messages was that the cell phone was found in the same house as defendant, albeit in a drawer in a common area, and that some of the messages referred to, or were directed at, a person with the same first name as defendant. There were no cell phone records or eyewitness testimony showing that the phone belonged to or had been used by defendant, or that any of the messages were sent to defendant. And there were no identifying marks on the cell phone or its display screen indicating that it belonged to defendant.

Under these facts, the evidence did not properly authenticate that the text messages were sent to defendant, and thus the presence of the phone in the drawer did not show by implication that defendant also possessed the drugs. Defendant's conviction was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Sharifa Rahmany, Chicago.)

INDICTMENTS, INFORMATIONS, COMPLAINTS

§29-6

People v. Chenoweth, 2015 IL 116898 (No. 116898, 1/23/15)

Under section 3-5(b) of the Criminal Code, a felony prosecution must be commenced within three years after the offense was committed. 720 ILCS 5/3-5(b). Section 3-6, however, extends the statute of limitations in certain situations. For theft involving breach of a fiduciary obligation, section 3-6(a) allows a prosecution to begin "within one year after the discovery of the offense by the aggrieved person." In the absence of such discovery, the prosecution must begin "within one year after the proper prosecuting office becomes aware of the offense."

Defendant's stepmother gave defendant power of attorney, allowing her to carry out various financial transactions without prior notice or approval, including the sale of her house in 2005. In 2008, the police learned that defendant had written unauthorized checks on the stepmother's account and proceeds from the house sale were missing. A police officer informed the stepmother of the unauthorized transactions and missing proceeds on December 5, 2008.

The officer continued his investigation, eventually determined that defendant's conduct was illegal, and presented his findings to the prosecutor in January 22, 2009. The prosecutor indicted defendant with financial exploitation of an elderly person on December 21, 2009.

Defendant argued that the indictment was barred by the statute of limitations since she was charged more than one year after the date the aggrieved person, her stepmother, discovered the offense. According to defendant, her stepmother discovered the offense when the officer informed her of the suspicious transactions and missing proceeds on December 5, 2008, more than one year before defendant was charged.

The Supreme Court rejected this argument, holding that the stepmother did not discover the offense when she spoke to the officer on December 5, 2008. The phrase "discovery of the offense" means gaining knowledge or finding out that a criminal statute has been violated. After the December 5th conversation, however, the stepmother only suspected that a crime may have occurred. Because defendant had power of attorney to carry out financial transactions without advance notice or approval, further investigation was needed to determine whether defendant had actually violated a criminal statute.

Since the stepmother did not discover the offense on December 5, 2008, the one-year extension began on January 22, 2009, when the "proper prosecuting office" became aware of the offense. The indictment on December 21, 2009 was thus within the one-year extension period.

(Defendant was represented by Assistant Defender Janieen Tarrance, Springfield.)

JUVENILE PROCEEDINGS

§33-6(a)

In re Shermaine S., 2015 IL App (1st) 142421 (No. 1-14-2421, 1/9/15)

Under the habitual juvenile offender statute, a minor who is adjudicated delinquent for certain serious felonies, such as first degree murder, criminal sexual assault, or robbery, and has two prior felony adjudications, is adjudged an habitual

juvenile offender and must be committed to Department of Juvenile justice until his 21st birthday. 705 ILCS 405/5-815.

Defendant argued that the statute violated the Eighth Amendment because it precludes the court from considering individualized factors about the minor, including his youth and attendant circumstances, as required by **Miller v. Alabama**, 132 S.Ct. 2455 (2012). He also argued that it violated the proportionate penalties clause of the Illinois Constitution which requires a court to consider rehabilitation in imposing sentence.

The Appellate Court rejected both arguments. The court first noted that the Illinois Supreme Court has held that the Eighth Amendment and the proportionate penalties clause do not apply to juvenile proceedings since they only apply to the criminal process and juvenile proceedings are not criminal in nature. **In re Rodney H.**, 223 Ill. 2d 510 (2006). But even if they did apply, the statute would not violate either constitutional provision.

In **People ex rel. Carey v. Chrastka**, 83 Ill. 2d 67 (1980), the Illinois Supreme Court held that sentencing a habitual juvenile offender until the age of 21 did not violate the Eighth Amendment. **Miller** does not change this result because unlike this case, **Miller** involved juveniles who were tried as adults. Moreover, **Miller** did not prohibit all mandatory penalties, but only mandatory life sentences.

The statute also does not violate the proportionate penalties clause. Although the Illinois Supreme Court stated in **People v. Clemons**, 2012 IL 107821, that the language of the clause requiring all penalties to have "the objective of restoring the offender to useful citizenship," indicated that it goes beyond the Eighth Amendment, elsewhere, both before and after **Clemons**, the court has held that the clause is co-extensive with the Eighth Amendment. **In re Rodney H.**; **People v. Patterson**, 2014 IL 115102. Since the court held in **Chrastka** that the statute did not violate the Eighth Amendment, it similarly cannot violate the co-extensive proportionate penalties clause.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

§§33-6(e), 33-7(b)

In re C.C., 2015 IL App (1st) 142306 (No. 1-14-2306, 1/6/15)

Under the extended juvenile jurisdiction statute (705 ILCS 405/5–810), upon a finding of guilty the trial court must impose a juvenile court sentence and a conditional adult criminal sentence. If the minor successfully completes the juvenile sentence, the adult sentence is vacated.

If the minor commits a new offense, the adult sentence must be implemented. In addition, if the juvenile violates the conditions of the juvenile sentence in some way other than by committing a new offense, the trial court has discretion to revoke the juvenile sentence and implement the adult sentence.

Defendant was committed to Department of Juvenile Justice until he was 21, with a conditional adult sentence of 45 years in the Department of Corrections. He appealed, arguing that the 45-year-sentence violated the Eighth Amendment and the proportionate penalties provision of the Illinois Constitution.

The court concluded that because the State had not filed a petition to revoke the stay on the adult sentence or accused the minor of violating the conditions of his juvenile sentence, the minor had not suffered any injury due to the adult sentence. Therefore, he lacked standing to challenge that sentence.

(Defendant was represented by Assistant Defender Heidi Lambros, Chicago.)

§33-7(b)

In re Henry B., 2015 IL App (1st) 142416 (No. 1-14-2416, 1/26/15)

In general, the Appellate Court has jurisdiction to review final judgements. However, it lacks jurisdiction to review an interlocutory order unless jurisdiction is afforded by Supreme Court rule. Two rules authorize appeals in juvenile cases. Rule 660(a) provides for appeals from final judgements, and Rule 662 allows an appeal from an interlocutory order where no dispositional order has been entered in 90 days.

The court concluded that where a continuance under supervision is ordered under 705 ILCS 405/5–615 without a finding of guilt or a judgement order, neither Rule 660(a) nor Rule 662 authorizes an appeal. Because the Appellate Court lacked jurisdiction, the appeal was dismissed.

NARCOTICS

§35-3(b)

People v. Coleman, 2015 IL App (4th) 131045 (No. 4-13-1045, 1/6/15)

Where a defendant is charged with possessing a specific amount of an illegal drug and there is a lesser included offense involving possession of a smaller amount, the weight of the substance is an essential element of the offense and must be proven beyond a reasonable doubt. Thus, where the suspected contraband was seized in separate

containers, the State can carry its burden concerning the aggregate weight only if it can show that each of the packages contained the controlled substance. Although random testing may suffice where contraband consists of identical items such as tablets, if loose powder is involved the State must test each of the separate containers in order to carry its burden.

(Defendant was represented by Assistant Defender Allen Andrews, Springfield.)

REASONABLE DOUBT

§42-3

People v. Cannon, 2015 IL App (3d) 130672 (No. 3-13-0672, 1/7/15)

When a criminal statute contains an exemption, the State has the burden of proving that the exemption does not apply, unless the statute specifically places the burden of proving the existence of the exemption on defendant.

The Liquor Control Act prohibits the consumption of alcohol by anyone under age 21, unless they are under the direct supervision and approval of a parent in the privacy of a home. 235 ILCS 5/6-20(e), (g). The majority held that it was the State's burden to prove that defendant's mother did not supervise and approve her son's consumption of alcohol in their home. Since there was no evidence on this issue, the State failed to prove defendant guilty of unlawful consumption of alcohol by a minor beyond a reasonable doubt.

The dissent believed the majority incorrectly equated an exemption with an affirmative defense. The State has the burden of disproving an affirmative defense once defendant presents sufficient evidence to raise the defense, but the State does not have the burden of disproving the existence of an exemption. Since the statute at issue created an exemption, not an affirmative defense, the dissent would have affirmed the conviction.

§42-8

People v. Roe, 2015 IL App (5th) 130410 (No. 5-13-0410, 1/6/15)

An indictment must apprise a defendant of the precise offense he is charged with, and a fatal variance between the indictment and the evidence is a violation of due process and requires reversal of the conviction. To be fatal, a variance must be material and mislead the defendant in making his defense or expose him to double jeopardy.

The State charged defendant with failing to register as a sex offender "within three days of his conviction," but the evidence showed that he failed to register within three days of his release from imprisonment. The court held that this was a nonfatal variance and did not violate due process.

The indictment and the relevant criminal statute must be read together, and both must be interpreted as a whole. The sex offender registration statute requires a convicted offender to register within three days after his conviction or if he is unable to register because he is incarcerated, within three days of his release from imprisonment. 730 ILCS 150/3(c)(3),(4). When read as a whole, the statute provides a clear alternative to the three-day time limit for registering after conviction when it is impossible for an imprisoned offender to register. The indictment charged defendant with the "functional equivalent" of this alternative since defendant had been incarcerated after his conviction and could not have registered. The indictment thus did not have a fatal variance.

Even if the indictment did not specifically apprise defendant of the charge against him, the court found that any variance would not require reversal because it was not material or misleading, and would not expose defendant to double jeopardy. At no point did defendant express a misunderstanding of the charges or argue that he could not register because he was incarcerated. And defendant could not be exposed to double jeopardy since the State would not be able to charge him again with failure to register during the time frame at issue here.

Defendant's conviction was affirmed.

(Defendant was represented by Assistant Defender Alexander Muntges, Mt. Vernon.)

ROBBERY

§43-1

People v. Davis, 2015 IL App (1st) 121867 (No. 1-12-1867, 1/20/15)

Defendant argued that his convictions and sentences for armed robbery in 1985 violated the proportionate penalties clause since, based on the facts of his case, armed robbery had the identical elements as armed violence with a category II weapon, but armed robbery was a Class X felony, while category II armed violence was a Class 2 felony.

In 1985, the Class X offense of armed robbery was defined as committing robbery while armed with a dangerous weapon. Ill. Rev. Stat. 1985, ch. 38, ¶18-2(a), (b). Armed violence was defined as committing any felony while armed with a dangerous weapon. Ill. Rev. Stat. 1985, ch. 38, ¶ 33A-2. If the dangerous weapon was a category I weapon,

including firearms, the offense was a Class X felony. Ill. Rev. Stat. 1985, ch. 38, ¶¶33A-1(b), 33A-3(a). If, however, the dangerous weapon was a category II weapon, such as a bludgeon, the offense was a Class 2 felony. Ill. Rev. Stat. 1985, ch. 38, ¶¶33A-1(c), 33A-3(b).

Defendant argued that the juries in his cases were never asked to identify the dangerous weapons used during the offenses and there was no evidence the weapons met the statutory definition of a firearm. Accordingly, the dangerous weapons used in his cases were category II weapons, such as bludgeons. And if this were the case, his sentences for armed robbery violated the identical elements test.

The court rejected this argument. The trial records showed that the main issue in each case was whether the weapon was a real or toy gun. Defendant argued that the weapons were toy guns, not dangerous weapons. The court concluded that by finding defendant guilty, the juries rejected defendant's arguments that he was only armed with toy guns and thereby implicitly found that the weapons were real guns. Defendant's armed robbery convictions thus may not be properly compared to armed violence with a category II weapon. The sentences did not violate the identical elements test.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

SEARCH AND SEIZURE

§§44-1(a), 44-12(a)

People v. Bozarth, 2015 IL App (5th) 130147 (No. 5-13-0147, 1/26/15)

1. Police-citizen encounters are divided into three tiers: (1) arrests, which must be supported by probable cause; (2) "**Terry** stops," which must be supported by a reasonable, articulable suspicion of criminal activity; and (3) encounters which involve no coercion or detention and thus do not implicate the Fourth Amendment. Whether a person seated in a parked vehicle has been "seized" depends on whether a reasonable person in the same situation would believe that she was free to decline the officer's request and terminate the encounter. When a police officer restrains the liberty of a citizen through the use of physical force or a show of authority, a seizure has occurred.

Here, a seizure occurred where a police officer saw defendant's car drive onto private property, followed and stopped behind defendant's car, exited his squad car with his weapon drawn, and testified that had defendant driven away he probably would have followed her and activated his overhead lights. The court concluded that under these circumstances defendant was seized when the officer pulled behind her vehicle.

2. Under **Terry**, an officer may conduct a brief, investigatory stop where there is a reasonable belief that the subject of the stop has committed or is about to commit

a crime. An investigatory stop must be justified at its inception, and the officer must be able to point to specific, articulable facts which, together with rational inferences, warrant the stop.

Where the officer's uncontroverted testimony established that he lacked any basis to suspect criminal activity when he began following defendant's vehicle and that he went on the private property just to see if anything "might happen," there was no reasonable basis to believe that a crime had or was about to occur. Therefore, the **Terry** stop was improper.

3. The court rejected the State's argument that the officer was acting in a community caretaking capacity when he followed defendants's vehicle onto the private drive. Community caretaking occurs where police are performing some act unrelated to the investigation of crime. The officer's testimony "belies the claim that he was acting in a community caretaking capacity where he testified that it entered his mind that [defendant] might be hiding from the police, involved in theft, making methamphetamine, or foul play."

The denial of the defense motion to quash the arrest and suppress evidence was reversed. Because the State could not prevail on remand without the suppressed evidence, the trial court's finding of guilt and order placing defendant on supervision were also reversed.

(Defendant was represented by Assistant Defender Maggie Heim, Mt. Vernon.)

§44-2

People v. Burns, 2015 IL App (4th) 140006 (No. 4-14-0006, 1/30/15)

In **Florida v. Jardines**, 133 S.Ct. 1409 (2013), the Supreme Court held that using a drug-detection dog on the porch of home constituted a search under the Fourth Amendment. The Fourth Amendment applies to the home and its curtilage, the area immediately surrounding and associated with the home. The Supreme Court held that a front porch is the classic exemplar of an area immediately adjacent to and associated with the home, and as such the police physically intruded upon a constitutionally protected area by using a drug-detection dog to conduct a search on the front porch. The court reached this decision by applying the traditional property-based understanding of the Fourth Amendment, and did not need to consider the reasonable expectation of privacy test, which had been added to, not substituted for, the property test.

Here the police conducted a search with a drug-detection dog at the door of defendant's apartment after entering the locked third-floor landing of the apartment building. The Appellate Court held that here, as in **Jardines**, the police conducted a search in a constitutionally protected area in violation of the Fourth Amendment.

The court rejected the State's argument that ***Jardines*** did not apply because defendant resided in a multi-unit apartment building rather than a single-family home. **Jardines** never definitively identified the residence there as a single-family home, and not a single Supreme Court case has limited the Fourth Amendment on the basis of the type of residence being searched. Both a front porch and the landing of an apartment building are part of the home and it's immediate surroundings. Thus when the police stood at the front door of defendant's apartment with a drug-detection dog their search took place in a constitutionally protected area.

The trial court's suppression of the evidence was affirmed.

SENTENCING

§45-1(b)(2)

In re Shermaine S., 2015 IL App (1st) 142421 (No. 1-14-2421, 1/9/15)

Under the habitual juvenile offender statute, a minor who is adjudicated delinquent for certain serious felonies, such as first degree murder, criminal sexual assault, or robbery, and has two prior felony adjudications, is adjudged an habitual juvenile offender and must be committed to Department of Juvenile justice until his 21st birthday. 705 ILCS 405/5-815.

Defendant argued that the statute violated the Eighth Amendment because it precludes the court from considering individualized factors about the minor, including his youth and attendant circumstances, as required by **Miller v. Alabama**, 132 S.Ct. 2455 (2012). He also argued that it violated the proportionate penalties clause of the Illinois Constitution which requires a court to consider rehabilitation in imposing sentence.

The Appellate Court rejected both arguments. The court first noted that the Illinois Supreme Court has held that the Eighth Amendment and the proportionate penalties clause do not apply to juvenile proceedings since they only apply to the criminal process and juvenile proceedings are not criminal in nature. **In re Rodney H.**, 223 Ill. 2d 510 (2006). But even if they did apply, the statute would not violate either constitutional provision.

In **People ex rel. Carey v. Chrastka**, 83 Ill. 2d 67 (1980), the Illinois Supreme Court held that sentencing a habitual juvenile offender until the age of 21 did not violate the Eighth Amendment. **Miller** does not change this result because unlike this case, **Miller** involved juveniles who were tried as adults. Moreover, **Miller** did not prohibit all mandatory penalties, but only mandatory life sentences.

The statute also does not violate the proportionate penalties clause. Although the Illinois Supreme Court stated in **People v. Clemons**, 2012 IL 107821, that the language of the clause requiring all penalties to have "the objective of restoring the offender to useful citizenship," indicated that it goes beyond the Eighth Amendment, elsewhere, both before and after **Clemons**, the court has held that the clause is co-extensive with the Eighth Amendment. **In re Rodney H.**; **People v. Patterson**, 2014 IL 115102. Since the court held in **Chrastka** that the statute did not violate the Eighth Amendment, it similarly cannot violate the co-extensive proportionate penalties clause.

(Defendant was represented by Assistant Defender Jonathan Krieger, Chicago.)

§45-1(b)(2)

People v. Davis, 2015 IL App (1st) 121867 (No. 1-12-1867, 1/20/15)

Defendant argued that his convictions and sentences for armed robbery in 1985 violated the proportionate penalties clause since, based on the facts of his case, armed robbery had the identical elements as armed violence with a category II weapon, but armed robbery was a Class X felony, while category II armed violence was a Class 2 felony.

In 1985, the Class X offense of armed robbery was defined as committing robbery while armed with a dangerous weapon. Ill. Rev. Stat. 1985, ch. 38, ¶18-2(a), (b). Armed violence was defined as committing any felony while armed with a dangerous weapon. Ill. Rev. Stat. 1985, ch. 38, ¶ 33A-2. If the dangerous weapon was a category I weapon, including firearms, the offense was a Class X felony. Ill. Rev. Stat. 1985, ch. 38, ¶¶33A-1(b), 33A-3(a). If, however, the dangerous weapon was a category II weapon, such as a bludgeon, the offense was a Class 2 felony. Ill. Rev. Stat. 1985, ch. 38, ¶¶33A-1(c), 33A-3(b).

Defendant argued that the juries in his cases were never asked to identify the dangerous weapons used during the offenses and there was no evidence the weapons met the statutory definition of a firearm. Accordingly, the dangerous weapons used in his cases were category II weapons, such as bludgeons. And if this were the case, his sentences for armed robbery violated the identical elements test.

The court rejected this argument. The trial records showed that the main issue in each case was whether the weapon was a real or toy gun. Defendant argued that the weapons were toy guns, not dangerous weapons. The court concluded that by finding defendant guilty, the juries rejected defendant's arguments that he was only armed with toy guns and thereby implicitly found that the weapons were real guns. Defendant's armed robbery convictions thus may not be properly compared to armed violence with a category II weapon. The sentences did not violate the identical elements test.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

§45-1(b)(2)

People v. Taylor, 2015 IL 117267 (No. 117267, 1/23/15)

1. Under 720 ILCS 5/18-2(a)(2), a 15-year term is added to the sentence for armed robbery where the perpetrator was armed with a firearm. In **People v. Hauschild**, 226 Ill.2d 63, 871 N.E.2d 1 (2007), the court concluded that the sentencing add-on violated the proportionate penalties clause of the Illinois constitution. The General Assembly then cured the proportionate penalties violation by enacting P.A. 95-688 (eff. 10/23/07).

The court concluded that where defendant's offense and sentencing occurred after **Hauschild** but before the legislature enacted P.A. 95-688, the 15-year enhancement could not be imposed. Because the sentence enhancement was unconstitutional, defendant's sentence was void. The cause was remanded for re-sentencing without the sentencing enhancement.

2. The court declined defendant's request to vacate the 15-year add-on so that defendant would serve the remaining nine years of the original 24-year-sentence. The court concluded that the sentence must be viewed as a whole rather than as separate nine and 15-year components, and declined to exercise its power to reduce the sentence because the 24-year-term was not manifestly disproportionate to the offense and defendant did not argue that the term was excessive.

The court concluded that the most appropriate action was to reconfigure the sentence to comply with the parties' expectations when they entered the plea agreement. Because the plea agreement provided that defendant would serve no more than 30 years and the applicable sentencing range was six to 30 years, the cause was remanded for re-sentencing to no more than 30 years without the firearm enhancement.

The court rejected the argument that the sentence should be capped at the 24-year-term imposed at the original sentencing. Although a sentence cannot be increased upon resentencing where there is a reasonable likelihood of vindicativeness, that rule does not apply where the original sentence was void. The court also noted that defendant waived the issue of a sentencing cap by raising it for the first time in the reply brief, and that the issue was premature unless and until on remand a sentence greater than 24 years is imposed.

(Defendant was represented by Assistant Defender Paul Rogers, Elgin.)

WAIVER – PLAIN ERROR – HARMLESS ERROR

§§56-2(a), 56-2(b)(1)(a)
People v. Getter, 2015 IL App (1st) 121307 (No. 1-12-1307, 1/6/15)

The State argued that the error in this case, the failure to instruct the jury on self-defense, did not constitute second-prong plain error since the Illinois Supreme Court has limited second-prong plain error to structural error, in particular the six examples of structural error identified by the United States Supreme Court: complete denial of counsel, trial before a biased judge, racial discrimination in grand jury selection, denial of the right to self-representation, denial of a public trial, and defective reasonable doubt instructions.

The Appellate Court rejected the State's argument, holding that while the Illinois Supreme Court has analogized second-prong plain error to structural error, it has never limited it to structural error, and has instead found second-prong plain error in situations other than the six examples cited by the State. In **People v. Sargent**, 239 Ill. 2d 166 (2010), for example, the Supreme Court found that the failure to instruct the jury on hearsay statements made by a child sex-abuse victim rises to the level of second-prong plain error since it creates a serious risk that the jurors did not understand the applicable law, which would seriously threaten the fairness of trial. This test would be unnecessary if the only question was whether the error fit within one of the six categories of structural error.

The Appellate Court found that the failure to instruct the jury on self-defense constituted second-prong plain error. It reversed defendant's conviction and remanded for a new trial.

Defendant was represented by Assistant Defender David Berger, Chicago.)